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4 IN THE UNITED STATES DISTRICT COURT

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8 UNITED STATES OF AMERICA,
9 Plaintiff,
10 v.
11 SHAPOUR MOTAMEDI, SHAYAN
12 MOTAMEDI, and HERIBERTO MOISES
13 LOPEZ,
14 Defendants.

No. CR 18-00554 WHA

**ORDER RE MOTION TO
DISMISS INDICTMENT**

15 **INTRODUCTION**

16 In this criminal action for conspiracy to pay and receive healthcare kickbacks,
17 defendants move to dismiss the indictment. For the following reasons, the motion is **DENIED**.

18 **STATEMENT**

19 The California Medical Assistance Program is a program that provides below-cost
20 healthcare to certain individuals. The Medi-Cal program includes a program known as Family
21 PACT that provides funding for a limited suite of family planning-related services such as
22 contraceptive methods and treatment of certain sexually transmitted diseases.

23 In November 2018, an indictment charged defendants Shapour Motamedi, Shayan
24 Motamedi, and Heriberto Moises Lopez with violating 18 U.S.C. § 371 which states, “[i]f two
25 or more persons conspire either to commit any offense against the United States, or to defraud
26 the United States, or any agency thereof in any manner or for any purpose, and one or more of
27 such persons do any act to effect the object of the conspiracy, each shall be fined under this title
28 or imprisoned not more than five years, or both. If, however, the offense, the commission of
which is the object of the conspiracy, is a misdemeanor only, the punishment for such

1 conspiracy shall not exceed the maximum punishment provided for such misdemeanor.” The
2 indictment specifically charges defendants with a conspiracy to pay and receive health care
3 kickbacks in violation of the following anti-kickback statutes: 42 U.S.C. § 1320a-7b(b)(1)(B)
4 and § 1320a-7b(b)(2)(B).

5 The indictment alleges that around at least October 2015 to October 2018, defendants
6 Shapour and Shayan operated a company called MegaMed Clinical Laboratories. Defendant
7 Lopez acted as an intermediary between doctors and clinics and MegaMed. As part of the
8 conspiracy, defendants paid kickbacks to representatives of medical clinics in exchange for
9 clinics sending specimens to MegaMed for payment. Defendants offered representatives either
10 a percentage of Medi-Cal’s reimbursement for tests or a fixed fee per specimen. The indictment
11 alleges multiple specific instances in which Shapour or Shayan paid or corresponded with
12 individuals in furtherance of the kickback conspiracy.

13 In August 2019, defendants filed a motion to dismiss the indictment pursuant to Federal
14 Rules of Criminal Procedure 12(b)(1) on the grounds that the anti-kickback statutes the
15 indictment is based on are unconstitutionally vague and violate the non-delegation doctrine, and
16 accordingly, because a conspiracy crime requires an agreement to violate the law, the charges
17 cannot stand. The government opposes.

18 ANALYSIS

19 In determining whether a law is unconstitutionally vague, courts will look to whether the
20 law: “(1) involved only economic regulation, (2) contained only civil, not criminal penalties, (3)
21 contained a scienter requirement, which might mitigate any vagueness, and (4) threatened any
22 constitutionally protected rights statute must give a person of ordinary intelligence adequate
23 notice of the conduct it proscribes.” *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489,
24 498 (1982). A statute must give a person of ordinary intelligence adequate notice of the
25 conduct it proscribes. *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 571 (9th Cir.
26 2018)

27 Defendants support their argument that the anti-kickback statutes are unconstitutionally
28 vague without any citations to the statutory language, but rather with a conclusory statement

1 that a reading of the safe harbor statute as well as the opinions and special fraud alerts issued by
2 the Office of the Inspector General “does not give an ordinary person fair warning about what
3 the law demands” and that Congress “shirked its responsibility to clearly write what conduct is
4 proscribed in regards to the anti-kickback statutes.” Contrary to this assertion, the anti-
5 kickback statutes are not vague under *Davis* or *Hanlester*. The anti-kickback statutes regulate
6 only economic conduct and do not chill any constitutional rights. Although they allow for
7 criminal penalties, they also require “knowing and willful” conduct, a requirement which
8 mitigates any vagueness in the statutes. *Hanlester Network v. Shalala*, 51 F.3d 1390, 1397–98
9 (9th Cir. 1995). Furthermore, unlike *United States v. Davis* where it was unclear whether
10 Congress intended for the statute to impose additional punishment under the residual clause,
11 Congress’s intent under the anti-kickback statutes is clear, and amendments regarding the
12 manner of implementation and promulgation of safe-harbor regulations have added even further
13 clarity. 139 S. Ct. 2319 (2019); *see e.g.* 42 U.S.C. § 1320a-7c.

14 Relatedly, defendants’ other argument is that Congress has unconstitutionally delegated
15 the power to define a crime in the anti-kickback statutes to the Office of the Inspector General
16 and Attorney General. Congress may delegate its legislative power to an agency as long as it
17 provides an intelligible principle to which the person or the body authorized is directed to
18 conform. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (*quoting J.W. Hampton, Jr. &*
19 *Co. v. United States*, 276 24 U.S. 394, 409 (1928)). The “delegation is permissible if Congress
20 has made clear to the donee ‘the general policy’ he must pursue and the ‘boundaries of [his]
21 authority.’” These standards are not demanding. *Gundy v. United States*, 139 S. Ct. 2116, 2129
22 (2019).

23 In 1977, Congress enacted the Medicare-Medicaid Anti-fraud and Abuse Amendments
24 which prohibited (1) the solicitation or receipt of any remuneration (including any kickback,
25 bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, in return for
26 referrals, and (2) the offer or payment of such remuneration to induce referrals. Pub. L. 95-142
27 § 1877(b)(1). Subsequently in 1987, Congress enacted the Medicare and Medicaid Patient and
28 Program Protection Act which consolidated the anti-kickback laws and importantly required the

1 Secretary of the Department of Health and Human Services in consultation with the Office of
2 the Inspector General to issue safe harbor regulations specifying payment practices that are not
3 subject to criminal prosecution under the anti-kickback statutes. 42 U.S.C. § 1320a-7(b)(7). In
4 1996, as part of the Health Insurance Portability and Accountability Act (HIPPA), the Secretary
5 was directed to, among other things, conduct investigations, audits, evaluations, and inspections
6 relating to the delivery of and payment for health care in the United States with the OIG and the
7 Secretary General. *Id.* at § 1320a-7c(a)(1). Section 205 of the same act also provides
8 numerous criteria for the Secretary to consider in establishing safe harbor laws. *Id.* at
9 § 1320a-7d(a)(2).

In supporting their argument, defendants cite again to *Davis*, which applies a vagueness analysis on the residual clause definition of a violent felony and is not relevant here. 139 S. Ct. at 2319. They also cite to the dissent in *Gundy* for the proposition that vague laws violate the nondelegation doctrine. 139 S. Ct. at 2134. The dissent in *Gundy* is not binding. Defendants argue that “a reasonable observer would add Justices Alito and Kavanaugh to constitute a five justice majority.” This does not change the fact Justice Kavanaugh took no part in the consideration or decision of the case and that Justice Alito concurred in the judgment in *Gundy*.

17 Because the anti-kickback laws are not vague, and as the government argues, the
18 legislative history and statutory language behind the laws here suggest that Congress laid out an
19 intelligible principle and a general policy that manifests Congress' dual policy objectives: (1) to
20 strengthen the Secretary's ability to combat fraud and abuse within the Medicare-Medicaid
21 system, and (2) to assure health care providers that they will not be subject to the statutes'
22 criminal penalties for engaging in particular practices, the anti-kickback laws do not provide a
23 principal or policy in violation of the non-delegation doctrine and the motion to dismiss the
24 indictment is **DENIED**.

IT IS SO ORDERED.

26 || Dated: October 16, 2019.

Wm Alsop
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE